

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Douglas Dynamics, LLC, d/b/a/ Western
Products,

Plaintiff,

v.

B&P SUPPLY, INC.,

Defendant

CIVIL ACTION

Docket No: 04-cv-11467

**DECLARATION OF MICHAEL J. SCHAUT IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT'S MOTION TO AMEND ANSWER**

I, Michael J. Schaut, under pains and penalty of law, hereby declare that the following is true based upon my own knowledge:

1. I am the Controller of Plaintiff Douglas Dynamics, LLC, d/b/a/ Western Products ("Western"), a Limited Liability Company formed under the laws of the State of Delaware, with its principal place of business in Milwaukee, Wisconsin.

2. I make this declaration in support of Western's opposition to Defendant B&P Supply, Inc.'s ("B&P") motion to amend answer.

3. Western manufactures and sells snow and ice removal equipment and accessories such as snowplows and snowplow assemblies.

4. B&P is a retail distributor that purchased snow and ice removal equipment and accessories from Western for resale to consumers.

5. From November 2003 through March 2004, Western sold and delivered to B&P, and B&P purchased and accepted from Western, snow and ice removal equipment and accessories with a sales price of \$118,727.12.

6. Western made repeated demands to B&P to make payment on the outstanding invoices, yet B&P failed and refused to make any such payment to Western.

7. The invoices for the purchases that B&P made from Western clearly state: "ALL SALES SUBJECT TO WESTERN PRODUCTS CREDIT POLICY, WARRANTY MANUAL, AND TERMS OF SALE PREVIOUSLY PROVIDED TO CUSTOMER."

8. A true and accurate copy of an invoice for one of the purchases that B&P made from Western is attached hereto as Exhibit A.

9. A true and accurate copy of Western's Terms of Sale is attached hereto as Exhibit B.

10. Paragraph 2 of Western's Terms of Sale is entitled "Products" and it provides as follows:

You may produce [*sic*] those products authorized by us from time to time, and we reserve the right to discontinue, withdraw or limit the sale of any and all products, and to change the design and specifications of the products.

11. Paragraph 5 of Western's Terms of Sale is entitled "Nonexclusivity" and it provides as follows:

Although Western Products uses care in selecting its authorized outlets, you agree that your approval as an authorized outlet in no way constitutes the grant of a franchise or other exclusive or special right to purchase or sell Western Products' products. There is no franchise fee or other charge to you, other than the costs of the goods sold to you. We reserve the right to sell to others and to decline to sell to you for any reason or no reason, in our sole discretion, at any time.

DATED: March 10, 2005

/s/ Michael J. Schaut
Michael J. Schaut

EXHIBIT A**WESTERN PRODUCTS**

7777 NORTH 73RD STREET

P.O. BOX 245038
MILWAUKEE, WISCONSIN 53224-9538
414-354-2310

INVOICE

Page: 000001

OUR REMITTANCE ADDRESS IS:

WESTERN PRODUCTS DIVISION
DOUGLAS DYNAMICS L.L.C.
1340 SOLUTIONS CENTER
CHICAGO, IL 60677-1003

Sold-to:

B & P SUPPLY
260 COLUMBUS AVE
PITTSFIELD MA

01201

Ship-to:

B & P SUPPLY
260 COLUMBUS AVE
PITTSFIELD MA

01201

ORDER #	SHIP #	LOC.	SHIP MA	COL / PPD	INVOICE #
131170-00	099506	10	YELLOW	COLLECT	00139595
ORDER DATE	SHIP DATE	CUST #	PURCHASE ORDER #	JOB #	SL#
11/03/2003	11/26/2003	WO4100	1497#		16
					11/26/2003

LINE SEQ #	ITEM NUMBER DESCRIPTION	UOM	QTY'S:	ORDERED	SHIPPED	BACKORDERED	NET
				PRICES:	PER UNIT	EXTENDED	
27	63472	EA	1		1	0	
	BLADE ASSY - 7'-2"LSX				598.99	598.99	335.43
		Disc%:	44.00				
28	63470	EA	1		0	1	
	A, Q & L ASSY U LSX				810.63	.00	.00
		Disc%:	44.00				
THANK YOU FOR YOUR PROMPT PAYMENT							
Sales Amount							335.43
Misc. Charges							.00
Freight							.00
Sales Tax							.00

CASH DISCOUNTS, WHEN OFFERED ARE
APPLICABLE TO THE AMOUNT OF 1% 10 NET 30
MERCHANDISE ONLY.

INVOICE TOTAL

\$335.43

A LATE FEE OF 18% PER YEAR WILL BE CHARGED ON ALL PAST DUE ACCOUNTS TO THE EXTENT PERMITTED BY APPLICABLE LAW.

SELLER REPRESENTS THAT ALL GOODS COVERED BY THIS INVOICE WERE PROCESSED IN
COMPLIANCE WITH THE REQUIREMENTS OF SECTION 12 (A) AND ALL APPLICABLE
REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT OF 1938 AS AMENDED.

ALL SALES SUBJECT TO WESTERN PRODUCTS CREDIT POLICY, WARRANTY MANUAL, AND TERMS OF SALE PREVIOUSLY PROVIDED TO CUSTOMER.

**WESTERN PRODUCTS**

MAIL: P.O. Box 245038, Milwaukee, WI 53224-9538

SHIP: 7777 N 73rd Street, Milwaukee, WI 53223

PHONE: 414-354-2310 FAX: 414-354-8448; Sales 414-354-6664; Purchasing 414-354-1888

**WESTERN PRODUCTS
TERMS OF SALE****1. Definitions.**

In this Terms of Sale, the terms "you," "your," "authorized outlet," and "buyer" refer to the purchaser of any products (including but not limited to whole goods, parts and accessories) from Western Products. "We," "us," "our," and "Western Products" refer to Western Products, a division of Douglas Dynamics, LLC.

2. Products.

You may produce those products authorized by us from time to time, and we reserve the right to discontinue, withdraw or limit the sale of any and all products, and to change the design and specifications of the products.

3. Sole Terms and Conditions.

These Terms of Sale will govern all sales of products by Western Products to you. A PURCHASE ORDER OR OTHER OFFER OR CONFIRMATION OF PURCHASE CONTAINING ADDITIONAL OR DIFFERENT TERMS IS HEREBY EXPRESSLY REJECTED, AND YOUR ACCEPTANCE OF ANY PRODUCTS AND/OR YOUR PLACEMENT OF ANY ORDERS WITH WESTERN PRODUCTS INDICATES YOUR ASSENT TO THESE TERMS OF SALE.

4. Credit and Warranty Policies.

All product orders are subject to our acceptance and the terms of our standard Credit Policy and Warranty Manual, copies of which have been provided to you or are available upon your request, the terms of which are incorporated herein by reference. Our Credit Policy, the Warranty Manual and these Terms of Sale may be revised by us from time to time and shall become effective upon our publication of revisions to you and you agree to be bound by such revisions. Cancellation, modification, suspension or delay of your order will require our written approval.

5. Nonexclusivity.

Although Western Products uses care in selecting its authorized outlets, you agree that your approval as an authorized outlet in no way constitutes the grant of a franchise or other exclusive or special right to purchase or sell Western Products' products. There is no franchise fee or other charge to you, other than the costs of goods sold to you. We reserve the right to sell to others and to decline to sell to you for any reason or no reason, in our sole discretion, at any time.

6. Warranties.

The warranties set forth in our Warranty Manual, as revised from time to time, are exclusive and no other warranties, express or implied, including, without limitation, any implied WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE MADE AND ARE HEREBY DISCLAIMED IN CONNECTION WITH ANY PRODUCTS SOLD TO YOU BY WESTERN PRODUCTS. THE REMEDIES SET FORTH IN OUR WARRANTY POLICY ARE EXCLUSIVE. UNDER NO CIRCUMSTANCES SHALL WESTERN PRODUCTS BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR OTHER DAMAGES, OTHER THAN THE REMEDY OF REPAIR OR REPLACEMENT SET FORTH IN OUR WARRANTY MANUAL.

7. Shipment/Title.

All products are shipped FOB our designated plant. Risk of loss shall pass to you upon delivery to a common carrier or to your carrier at our plant. We retain, and you hereby grant to us, a security interest in all products sold to you until paid in full.



A DIVISION OF DOUGLAS DYNAMICS, L.L.C.

8. Taxes.

All taxes imposed on any and all transactions between us and you are your sole responsibility, other than taxes imposed upon the net income of Western Products.

9. Force Majeure.

We shall not be liable to you for any delay in delivery or other nonperformance caused by discontinuance or substantial interference with our business, in whole or in part, by reason of fire, flood, earthquake, tempest, labor dispute, war, act of God, embargo, civil commotion, governmental regulation, or any other cause beyond our reasonable control.

10. Logos and Trademarks; Proprietary Information.

"WESTERN®," Western Products, and the Western logo displayed in our literature are all trademarks of Western Products. You agree not to use the same, except with our express written consent. No such consent will grant you any license, and you will cease and desist in using any logos and trademarks of Western Products, upon written request from us. From time to time we may disclose confidential or proprietary information to you about us or our products and you agree to maintain such information in confidence so long as it is not publicly available.

11. Miscellaneous.

Neither these Terms of Sale nor the Warranty Manual or the Credit Policy may be modified except by a writing duly authorized by Western Products. All sales and other transactions between you and us are governed by the laws of the State of Wisconsin, without regard to conflicts of law principles. You represent and warrant us that you have all necessary licenses and permits to operate your business, including, without limitation, licenses and permits to sell our products and to install the same on motor vehicles, and further that you will comply with all applicable laws, regulations and governmental orders in the sale, installation and repair of our products. If any provision of these Terms of Sale, or the application thereof, is held to be unenforceable or invalid, the remaining provisions shall not be affected thereby. Neither these Terms of Sale nor any agreement for the sale of products between you and us can be assigned, without our express written consent. Nothing herein shall be deemed to create a relationship other than at will which may be terminated by us or you upon the giving of notice to the other.